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6 UNITED STATES DISTRICT COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8 SAN FRANCISCO DIVISION

9
10 UNITED STATES OF AMERICA,) CR No. 13-0764-WHO
11 Plaintiff)
12 vs.) DEFENDANT ANTONIO GILTON'S
13 ANTONIO GILTON,) IN LIMINE MOTIONS
14 Defendant.)
15) DATE: May 6, 2016
16) TIME: 9:00 a.m.
17) DEPT: Hon. William H. Orrick, District Judge
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15) DATE: May 6, 2016
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17) DEPT: Hon. William H. Orrick, District Judge
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17 TO THIS HONORABLE COURT, ASSISTANT UNITED STATES ATTORNEYS WILLIAM
18 FRENTZEN, DAMALI TAYLOR, AND SCOTT JOINER, AND ALL DEFENSE COUNSEL:
19 PLEASE TAKE NOTICE that Defendant Antonio Gilton, through undersigned counsel,
20 submits the following in limine motions pursuant to the Court's scheduling order.

21 **IN LIMINE MOTION NO. 1: THE COURT SHOULD NOT READ THE INDICTMENT
22 TO THE JURY OR SEND IT INTO THE JURY ROOM DURING DELIBERATIONS**

23 “[I]t is well settled that the jury must be fairly apprised of the nature of the charges
24 against the defendant, but this does not necessarily require a reading of the indictment to the jury
25 either in whole or in part.” *Robles v. United States*, 279 F.2d 401, 403–404 (9th Cir. 1960).
26 Instead, the choice whether or not to read an indictment to the jury or send it into the jury room is
27 within the sound discretion of the trial court. *United States v. Polizzi*, 500 F.2d 856, 876 (9th Cir.
28 1974); see also *United States v. Barreiro*, No. 5:13-cr-636, 2015 WL 7734139, *3–4 (N.D. Cal.

1 Dec. 1, 2015) (granting defendants' motion in limine not to read indictment or send it into jury
2 room). The indictment in the present case is twenty-four pages long, and contains many
3 "background" allegations that are both prejudicial and inessential to the charges. *See Second*
4 *Superseding Indictment*, Dkt. 139 at ¶¶ 1–14 (hereinafter "Indictment"). Its references to the
5 Grand Jury might lead a juror unfamiliar with our system to believe that the truth of the
6 allegations has already been established by another jury. As in *Barreiro*, the Court can fairly
7 apprise the jury of the charges against Gilton by reading a joint statement of the case to be agreed
8 among the parties, rather than by reading the Indictment or any part of it.

9 In the alternative, pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure,
10 Gilton moves to strike paragraphs 1–14 of the Indictment and the words "including, but not
11 limited to" in paragraph 17 of the Indictment, and bar the reading of charges against defendants
12 not presently on trial. The purpose of a motion under Rule 7(d) is to "protect a defendant against
13 'prejudicial or inflammatory allegations that are neither relevant nor material to the charges.'"
14 *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988); *see also* 1 Wright & Miller, *Fed.*
15 *Prac. & Proc. Crim.* § 128 (4th ed.) (where "prosecutors . . . insert unnecessary allegations for
16 'color' or 'background' hoping that these will stimulate the interest of the jurors . . . [t]he proper
17 course for the defense is to move to strike the surplusage"). "[D]escriptive material" that
18 precedes the language of the statute can therefore be stricken, *United States v. Root*, 366 F.2d
19 377, 381 (9th Cir. 1966), as can background allegations in a conspiracy case that "do not qualify
20 as overt acts supporting the conspiracy count." *United States v. Fernandez*, 388 F.3d 1199, 1220
21 (9th Cir. 2004).

22 In the present case, paragraphs 1–14 are just the kind of prejudicial "descriptive material"
23 that may be stricken under *Root* and *Fernandez*. Wearing a "Banga" tattoo, cupping one's hands
24 together to form a "U," being called a "shooter," or "promot[ing] a climate of fear" is not an
25 element of any charged offense, nor is the fact that CDP has allegedly been in existence "since at
26 least the mid-1990s." Indictment at ¶¶ 1, 2, 10(b). Likewise, the allegation that "CDP members
27 have been expected to use any means necessary to force respect from those who showed
28 disrespect" is mere "color" or "background," unnecessary to state the government's case and

1 useful only to inflame to jury against the defendants. The prejudicial effect of all these inessential
2 background paragraphs is obvious. To the extent that they allege overt acts or other elements
3 essential to charge, they merely duplicate allegations elsewhere in the Indictment. *Compare id.*, ¶
4 8 with ¶ 15; *id.*, ¶ 4 with ¶ 17(a)–(ii). They should therefore be stricken.

5 Finally, paragraph 17 alleges overt acts in furtherance of the conspiracy “including, but
6 not limited to,” 35 listed acts. The words “including, but not limited to” are surplusage, and are
7 prejudicial, since they hint to the jury that the Grand Jury were told about other unalleged acts.
8 See *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980) (words “including, but not
9 limited to” before list of alleged overt acts were surplusage).

10 **IN LIMINE MOTION NO. 2: JAIL CALLS PLACED BY GILTON SHOULD BE
11 EXCLUDED SINCE THEY ARE IRRELEVANT AND UNDULY PREJUDICIAL**

12 Government Exhibit 0884 is described as “10 Jail Calls – 8 jails calls with Antonio
13 Gilton.” United States’ Exhibit List, Dkt. 926 at 31. Defendant Gilton moves to exclude the eight
14 recordings of his jail calls, which he placed to friends and family during the evening of his arrest
15 on July 4, 2012. The recordings last 58 minutes and 28 seconds in total. The government has not
16 told Gilton what parts, if any, it will seek to admit. Most of the conversation is wholly unrelated
17 to the case. Among other things, Gilton talks about his bail, asks people to come to his next court
18 date, asks people to put money on his jail account and on his jail phone, chats about his family
19 and visiting at the jail, expresses concern for his mother, and complains about feeling unwell. Ex.
20 A at ¶ 2 (Declaration of Mark Goldrosen).

21 Under Rule 402 of the Federal Rules of Evidence, “[i]rrelevant evidence is not
22 admissible.” Here, it is readily apparent that large swathes of the jail calls are entirely irrelevant.
23 Nor has the government made a proffer establishing that any part of the jail calls tends to prove
24 or disprove any fact at issue in this case.

25 As well as being irrelevant, the calls are subject to exclusion under Rule 403. Under that
26 rule, the district court may exclude relevant evidence if its probative value is substantially
27 outweighed by a danger of unfair prejudice. On the recordings, Gilton occasionally uses
28 profanities, argues with his girlfriend about how long he is able to talk with her, and talks about

1 problems he is having in his relationship. Moreover, his girlfriend accuses him of being
2 untruthful when he says he will call her back in 30 minutes. Ex. A at ¶ 2. These unfavorable
3 glimpses into Gilton's personal life have no probative value, and are likely to cause unfair
4 prejudice.¹

5 **IN LIMINE MOTION NO. 3: STATEMENTS OF OTHER DEFENDANTS DESCRIBED
6 BY THE GOVERNMENT IN ITS SUMMARIES OF CO-CONSPIRATOR
7 STATEMENTS SHOULD NOT BE ADMITTED UNLESS THE GOVERNMENT
8 ESTABLISHES ADMISSIBILITY UNDER FED. R. EVID. 801(D)(2)(E)**

9 On November 24, 2015, the government provided the defense with a letter that contained
10 summaries of forty-four co-conspirator statements it intends to introduce at trial. *See* Ex. B
11 (Letter). It is clear that at least some of the statements, including Co-Defendant Jaquain Young's
12 recorded statement to an inmate informant on June 18, 2014,² do not qualify as co-conspirator
13 statements and should be excluded. The remaining statements should not be admitted unless the
14 government first introduces evidence establishing by a preponderance of the evidence that the
elements of Rule 801(d)(2)(E) of the Federal Rules of Evidence have been satisfied.

15 Rule 801(d)(2)(E) holds that statements made by co-conspirators "during the course and
16 in furtherance of the conspiracy" are not made inadmissible by the hearsay rule. However, before
17 admitting a statement under this rule, the Government must show that "(1) the declaration was in
18 furtherance of the conspiracy, (2) it was made during the pendency of the conspiracy, and (3)
19 there is independent proof of the existence of the conspiracy and of the connection of the
20 declarant and the defendant to it." *United States v. Eubanks*, 591 F.2d 513, 519 (9th Cir. 1979).
These essential elements must be proven by a preponderance of the evidence. *Bourjaily v. United*

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22
23 ¹The government lists other jail calls as exhibits, but the list is not specific as to who
24 participated in these calls. For example, Exhibit 1008 is described as "Jail Calls for 415-554-
25 2380 from 6/18/12-1/02/12." Dkt. 926 at 37. This specified phone number belongs to the San
26 Francisco Sheriff's Department. The list does not identify the Bates Number that corresponds to
these calls, but counsel believes the exhibit may refer to BG075356, which consists of hundreds,
if not thousands, of jail calls. Without knowing which calls, if any, the government intends to
use, Gilton is unable to make appropriate objections at this time. Gilton reserves the right to
object when the government has identified the calls it intends to put in evidence.

27 ²Gilton made the same argument regarding the inadmissibility of Young's statement to
28 the jailhouse informant in his Motion for Severance (Dkt. 939). That motion is also scheduled to
be heard on May 6, 2016.

1 *States*, 483 U.S. 171, 175 (1987).

2 While the court can consider the statements themselves as some evidence of these
3 foundational requirements, out-of-court statements are presumptively unreliable and should not
4 be admitted unless corroborated by “fairly incriminating evidence.” *See United States v.*
5 *Silverman*, 861 F.2d 571, 578 (9th Cir. 1988) (“Although . . . Fed. R. Evid. 104(a) permits a trial
6 judge to consider the co-conspirator’s out-of-court statement in assessing the statement’s
7 admissibility, Rule 104(a) does not diminish the inherent unreliability of such a statement. . . .
8 Evidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently
9 corroborative of the co-conspirator’s statement to constitute proof, by a preponderance of the
10 evidence, that the defendant knew of and participated in the conspiracy”). For that reason, co-
11 conspirator statements cannot be corroborated by other co-conspirator statements. *Id.* at 579
12 (“One presumptively unreliable statement cannot be invoked to corroborate another”).

13 The Ninth Circuit has narrowly interpreted the “in furtherance” language of Rule
14 801(d)(2)(E). The Rule does not apply to “[m]ere conversations between co-conspirators, or
15 merely narrative declarations among them.” *United States v. Yarbrough*, 852 F.2d 1522, 1535
16 (9th Cir. 1988). Nor does it apply to “casual admission[s] of culpability to someone [the
17 declarant has] individually decided to trust.” *United States v. Fielding*, 645 F.2d 719, 726 (9th
18 Cir. 1981) (citation omitted); *United States v. Castillo*, 615 F.2d 878, 883 (9th Cir. 1980).
19 Rather, to be “in furtherance,” the statements must further the common objectives of the
20 conspiracy or set in motion transactions that are an integral part of the conspiracy. *Eubanks*, 591
21 F.2d at 520. In short, the statements must assist the conspirators in achieving their objectives. *Id.*

22 Moreover, statements made after a co-conspirator has been apprehended are generally not
23 considered “in furtherance” of the conspiracy, except where the purpose of the statement is
24 concealment. *See Fiswick v. United States*, 329 U.S. 211, 217 (1946). “[C]onfession or
25 admission by one coconspirator after he has been apprehended is not in any sense a furtherance
26 of the criminal enterprise. It is rather a frustration of it.” *Id.* Once a co-conspirator confesses the
27 existence of the conspiracy, he “cease[s] to act in the role of a conspirator.” *Id.*

28 Whether a statement was made “in furtherance” of a conspiracy depends not “on its actual

1 effect in advancing the goals of the conspiracy, but on the declarant's intent in making the
2 statement." *United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir. 1991). For example, in
3 *United States v. Fielding*, 645 F.2d 719 (9th Cir. 1981), a co-conspirator "spoke generally" about
4 the conspiracy to an undercover agent. The statements, which were "narrations of things [the
5 conspirators] had done in the past," were part of the declarant's attempts "to impress [the agent]
6 in order to facilitate a new deal involving a new conspiracy that did not include appellant." *Id.* at
7 725, 727. Those statements were not admissible under Rule 801(d)(2)(E) because they were not
8 "in furtherance of" the charged conspiracy. *Id.* at 727.

9 Similarly, in *Eubanks*, the Ninth Circuit held inadmissible various statements made by a
10 co-conspirator to his common-law wife. 591 F.2d at 520. The statements detailed plans to buy
11 drugs in various locations from various people. *Id.* The wife was not involved in the conspiracy
12 at the time, although she later joined. *Id.* Nevertheless, the Court held that the statements did not
13 meet the "in furtherance" element of Rule 801(d)(2)(E). The co-conspirator "was not seeking to
14 induce [his wife] to join the conspiracy and his statement did not assist the conspirators in
15 achieving their objectives." *Id.* Rather, "he was merely informing his common-law wife about his
16 activities." *Id.*

17 A number of the statements described in the government's disclosure fail to qualify as co-
18 conspirator statements on their face. Summary No. 44 describes the recorded statement made by
19 Co-Defendant Jaquain Young to an inmate informant on June 18, 2014. At the time, Young was
20 in custody following his indictment for (1) attempted enticement of a minor to engage in
21 violation of 18 U.S.C. § 2422(b); and (2) attempted enticement of an individual to travel for
22 prostitution in violation of 18 U.S.C. § 2422(a). *United States v. Young*, No. 13-cr-00229-EMC
23 (N.D. Cal. filed Mar. 13, 2013). According to the disclosure:

24 Defendant Young made a number of admissions concerning himself and other
25 members of CDP. These include statements about the murder of Jelvon Helton
26 and the FBI investigation into that murder; statements about his girlfriend's
27 attempts to conceal evidence; statements about himself and other members
possessing and hiding guns; statements about himself and other members
committing murder; statements about the RICO case that his fellow gang
members had been charged with and whether Young would also be charged.

28 Ex. B at 9.

1 Rule 801(d)(2)(E) is inapplicable to Young’s statements here, for several reasons. First,
2 the alleged conspiracy had ceased to exist as of June 2014. Mr. Gilton was arrested July 4, 2012,
3 charged in state court, and initially indicted here on November 21, 2013. In addition, the Second
4 Superseding Indictment alleges overt acts only up to December 17, 2013. By the time of Young’s
5 statements, all of the defendants, like Young, were in government custody. The statements were
6 therefore not made “during the pendency of the conspiracy.” *Eubanks*, 591 F.2d at 519.

7 Even assuming, arguendo, that the conspiracy was ongoing, the statements were not made
8 “in furtherance of” it. The statements merely narrated past events and, as in *Fielding*, appear to
9 have been made for the purposes of “impressing” the informant, not advancing the goals or
10 objectives of the conspiracy. The notion that Young somehow intended to further the conspiracy
11 by airing all its supposed secrets—describing a litany of past crimes allegedly committed by Mr.
12 Gilton and others—is wholly unrealistic.

13 Moreover, as in *Eubanks*, there is nothing to indicate that Young sought to recruit the
14 informant into the conspiracy. Nor is there anything suggesting that Young sought to conceal the
15 existence of the conspiracy. The statements themselves are nothing more than “casual
16 admissions” made to someone Young thought he could trust. See *Fielding*, 645 F.2d at 725. The
17 alleged conspiracy was in no way “furthered” by his jailhouse admissions.

18 Other statements summarized in the government’s disclosure are also inadmissible on
19 their face. These include: Summary Nos. 2, 4, 5 (communications between Charles Heard and
20 Gary Owens from August 8 to August 15, 2008), 9 (letter written by Esau Ferdinand), 10 (letter
21 written by Ijeoma Ogbuagu), 12–13 (letters written by Reginald Elmore on August 31 and
22 September 19, 2012), 16, 18–22 (text messages by Esau Ferdinand), 27, 30, 32, 33, 35, 36 and 38
23 (text messages between Jaquin Young and women described as prostitutes on various dates after
24 July 4, 2012). Ex. B at 4–8. Nos. 9, 12 and 13 do not fall within the hearsay exception because
25 they are “mere[] narrative declarations” among alleged co-conspirators, and do nothing to further
26 the goals of the conspiracy. See *Yarbrough, supra*, 852 F.2d at 1535. Nos. 2, 4 and 5 likewise
27 consist of mere narrative declarations: the exception is even less applicable to those statements
28 since Gary Owens, the man to whom Heard was speaking, is not alleged to be a CDP member.

1 Nos. 16 and 18–20 consist, at most, of “casual admission[s] of culpability” to third parties, some
2 unknown, and are therefore also inadmissible: indeed, it appears from the summaries that nothing
3 of substance was admitted. *See Fielding*, 645 F.2d at 726.

4 Although Ferdinand is listed as the “Declarant” in Summary Nos. 21–22, the only
5 relevant statements appear to have been written by a party whose identity is unknown, and
6 therefore cannot qualify as a co-conspirator for hearsay purposes. *United States v. Mouzin*, 785
7 F.2d 682, 692–93 (9th Cir. 1986) (“Knowledge of the identity of the declarant is essential to a
8 determination that the declarant is a conspirator whose statements are integral to the activities of
9 the alleged conspiracy.”). Finally, Nos. 27, 30, 32, 33, 35, 36 and 38, text messages exchanged
10 between defendant Young and a woman described as a prostitute, do not fall within the hearsay
11 exception because they do not facilitate prostitution, arrange payment, or otherwise further the
12 goals of the alleged conspiracy.

13 The remaining statements summarized in the government’s disclosure (Nos. 1–8, 10–11,
14 14–17 and 23), although not objectionable as described, should not be admitted until the
15 government first establishes by preponderance of the evidence that the elements of FRE
16 801(d)(2)(E) have been satisfied.³ Although a pretrial evidentiary hearing is not required, a
17 hearing is requested here because of the number of statements involved and because many of the
18 summaries do not contain sufficient detail to allow the Court to rule on the admissibility of the
19 statements. *See Bourjaily*, 483 U.S. at 176 n. 1; *United States v. Tamez*, 941 F.2d 770, 775 (9th
20 Cir. 1991); *see also United States v. James*, 590 F.2d 575 (5th Cir. 1979) (suggesting that a
21 pre-trial determination is appropriate). Without a pre-trial hearing on the admission of the
22 statements, a tremendous amount of in-trial time will be used to resolve these issues, causing
23 interruptions in the presentation of evidence to the jury.

24 ///

25 ///

26 ³The defense is operating under the assumption that the government is only seeking to
27 introduce those portions of the extrajudicial statements that are described in the forty-four
28 summaries. If the government seeks to introduce other portions of the statements, Gilton may
have additional objections.

1 **IN LIMINE MOTION NO. 4: STATEMENTS OF CO-DEFENDANTS AND ALLEGED
2 UNINDICTED CO-CONSPIRATORS NOT PREVIOUSLY DISCLOSED AND
3 SUMMARIZED BY THE GOVERNMENT IN ITS NOVEMBER 24, 2015 LETTER
4 (EXHIBIT B) SHOULD BE EXCLUDED**

5 This Court's Order Setting Pre-Trial and Trial Schedule (Dkt. 353) directed the
6 government to produce co-conspirator statements on or before November 23, 2015. In addition,
7 Local Rule 16–1(c)(4) requires that the government disclose “[a] summary of any statement the
8 government intends to offer under F. R. Evid. 801(d)(2)(E) in sufficient detail that the Court may
9 rule on the admissibility of the statement.” Pursuant to the Court’s order and the local rule, the
10 government provided the defense with summaries of forty-four alleged co-conspirator
11 statements, as explained above. *See Ex. B.*

12 The government’s exhibit list (Dkt. 926) includes numerous exhibits that consist of
13 statements made by co-defendants or alleged unindicted co-conspirators. These statements are
14 custodial interrogations, interviews, letters, text messages, notes, emails, telephone calls, phone
15 messages, and plea transcripts. Admissibility against Gilton turns on whether they qualify as co-
16 conspirator statements pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence. However,
17 the vast majority of these statements were not mentioned in the government’s co-conspirator
18 statement disclosure.

19 The statements not previously disclosed in Exhibit B include the following: Exhibit Nos.
20 0050 (Gordon Statement), 0054 (Ferdinand Jail letter and envelope), 0055 (Ferdinand
21 miscellaneous notes in jail property), 0073 (Gordon’s Recorded Statement), 0087–90 (Facebook
22 returns for Carmichael, Gordon, Carmichael, and Gordon), 0091 (Owens BOP Email 10-25-11-
23 1), 0092 (Owens BOP Email Content), 94 (BOP Report), 0103 (BOP info re calls to Owens),
24 0106 (Facebook, unidentified), 0107 (Phone Download Report–Ferdinand), 0108 (Phone
25 Download Report–Vernon Carmichael), 0111 (Vernon Carmichael interview), 0117–18
26 (Facebook Returns – Carmichael and Gordon), 0128 (Greg Walker Jail Calls 10-01-11 to 10-26-
27 2011), 0144 (Jail Calls), 0166– 0169 (rap songs and unidentified YouTube videos), 0170 (Daryl
28

1 Jones letter to Charles Heard), 0172 (Charles Heard letter to Ijeoma Ogbuagu)⁴, 0174 (Ogbuago
2 letter to Charles Heard 9_7_2011)⁵, 0177 (Ijeoma Ogbuagu Note), 0178–0180 (rap videos), 0197
3 (SFSO Classification Interviews with Defendants and various unindicted CDP members)⁶, 0215
4 (Transcript of plea by Heard), 0232 (unidentified statement), 0289 (25–cd–02 Interview), 0290
5 (Interview Adrian Gordon), 0302 (Baxter Bradley Interview), 0303 (Reginald Elmore Interview),
6 0325 (Daryl Jones Interview), 0326 (Esau Ferdinand Interview), 0327 (Marzette Parker
7 Interview), 0328 (Monzell Harding Interview), 0329 (Vernon Carmichael Interview), 0330
8 (Frederick Maye Interview), 0341 (Transcript – Guilty Plea by Williams), 0364 (CD–Deron
9 Cheeves Interview), 0365 (CD–Deron Cheeves & Quinci Green Interview), 0366 (CD–Gregory
10 Walker Interview), 0391 (27 CDs–Jail Calls), 0399 (Deron Cheeves Interview), 0400 (Elmore
11 Interview), 0401 (Quincy Green interview first), 0402 (Quincy Green interview 2nd), 0403
12 (Quincy Green interview 3rd), 0404 (Green and Cheeves recording), 0414 (Myspace printouts),
13 0429 (Gregory Walker jail calls 01-10-2011), 0430 (Jail calls Gregory Walker 02-26-2011 to 9-
14 26-2011), 0440 (GW–0221 Jail Calls), 0443 (Jail Calls), 0444 (Interview with Julius Hughes),
15 0507 (Phone Dump Kyocera Metro PCS, 08-14-2008), 0517 (Victim Phone Downloads),
16 0544–0551 (Wire calls between Charles Heard and Gary Owens)⁷, 0559 (Heard’s phone
17 messages), 563 (Jail calls incident to booking), 0565 (Jail Calls: 415-947-9206, 415-678-0010,
18 415-410-4832), 0567 (phone extraction), 0574 (Cell phone extraction report – 415-577-3197),
19 0582 (Phone download – 415-568-7552), 0583 (Charles Heard Jail Calls – 7/28/09-8/5/09), 0594
20 (04–CD–01 Jail Calls), 0595 (04–CD–02 Phone Download), 0596 (Harding Interview), 0632

21

22 ⁴The government disclosure (Ex. B) lists a letter from Heard to Ogbuagu, dated June 29,
23 2011, as Summary No. 11. Because the government did not include the date of the letter listed as
24 Exhibit No. 0172, the undersigned cannot determine whether the exhibit is the same letter.

25 ⁵The government disclosure (Ex. B) includes a letter from Ogbuago to Heard dated May
26 15, 2011 as Summary No. 10, not a letter dated September 7, 2011.

27 ⁶This Court previously ruled that Gilton’s statement regarding gang affiliation during the
28 jail classification process was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966),
and was therefore inadmissible. Similar motions made by other defendants are being held in
abeyance until the Ninth Circuit decides the government’s appeal.

⁷The exhibit list includes six wire calls between Heard and Owens on August 15, 2008,
but the government disclosure (Ex. B) only notices three (Summary Nos. 3–5).

1 (Metro PCS–Text Messages), 0648 (03–Jail Calls), 0656 (Phone download – Baxter Bradley),
2 0657 (Phone download – Monzell Harding), 0658 (Phone download – Vernon Carmichael), 0663
3 (110893533 – Phone Exam Report), 0666 (Jail Calls), 0667 (Gordon Interview), 0680
4 (Transcript of Robeson Interview), 0685 (Robeson Interview), 0686 (One statement), 0698
5 (Phone download of UC phone containing texts with Robeson), 0701 (MMS messages traded
6 between Robeson and the UC), 0702 (Facebook messages with Robeson), 0707 (Deleted text
7 messages recovered from the UC phone), 0708 (Text messages traded between the UC and
8 Robeson from UC phone), 0709 (MMS messages traded between the UC and Robeson from UC
9 phone), 0719 (SMS and MMS texts traded between the UC and Robeson – combined),⁸ 0731
10 (email and letter from Facebook), 0735 (Printout of Google Voice text messages between the UC
11 and Jaquain Young), 0737 (CD–2 Phone calls between the UC and Young), 0739 (CD–Kik
12 messages), 0742 (Google Voice text messages provided by the UC), 0743 (Facebook messages
13 between the UC and Young provided by the UC), 0748 (CD– Emails), 0749 (CD–Jail calls),
14 0750 (KIK Message), 0753 (Phone download of UC Blackberry containing texts with Young),
15 0754 (Phone download of UC Blackberry containing texts with Young), 0755 (Phone download
16 of UC Metro PCS phone containing texts with Young), 0756 (Text messages recovered from
17 Young’s Sprint phone between the UC Blackberry and Young), 0757 (Text messages recovered
18 from Young’s Sprint phone between the UC Google Voice and Young), 0758 (MMS messages
19 recovered from Young’s Sprint phone between the UC and Young), 0760 (Facebook messages
20 between the UC and Young from UC Facebook account “Katie Marie”),⁹ 0768 (Young rap song),

⁸Summary No. 43 of the government disclosure is “All SMS, MMS, Facebook and phone conversations between Robeson and the UC regarding prostitution” occurring on or about October 2102. *See Ex. B at 8.* Counsel is uncertain whether Exhibits 0698, 0701, 0708, 0709, 0719 are referenced in Summary No. 43 since the government did not include dates for these exhibits in its list.

⁹The government disclosure includes summaries of nineteen statements made by Jaquin Young (Summary Nos. 24–42) regarding his alleged involvement in pimping. The disclosure specifies the approximate date on which each statement was made. Ex. B at 7–8. In the exhibit list, however, the government provides no dates with respect to any of the exhibits relating to statements made by Young. Due to the vagueness of the exhibit list, it cannot be determined whether Exhibits 0731, 0735, 0737, 0739, 0742–0743, 0748–0750, 0753–0758, and 0760 are referenced in the disclosure.

1 0774 (Emails), 0783 (Text Message Photographs), 0790 (Email–Re Ferdinand), 0791 (Email–Re
2 Norry), 0792 (Email–Video Canvass), 0796 (Norry phone report), 0811 (Facebook Messages –
3 Katelyn Wagner – UC Facebook Account), 0815 (Telephone Download–Esau Ferdinand), 0819
4 (Blackberry SMS), 0823 (Jail Calls Jaquain Young), 0824 (32–cd–24 Jail Calls – Esau Ferdinand
5 – Incidental to Booking), 0825 (32–cd–25 JY cell 408-375-7277 0 2012-345657-0001), 0847
6 (Data from Young’s Sprint Phone), 0848 (Data from cell phone), 0856 (All Audio recordings
7 between Young and CS (excised)), 0858 (Enhanced Audio from ERF–FAVIAU (Forensic
8 Audi/Video & Image Analysis Unit – 2/6/2014 from Glenn Dyer Detention Facility between CW
9 and Jaquain Young)), 0860 (Enhanced Audio from ERF–FAVIAU (Forensic Audi/Video &
10 Image Analysis Unit – 1/15/2014 from Glenn Dyer Detention Facility between CW and Jaquain
11 Young)), 0861 ((U) 2/6/2014; CW with Jaquain Young at Glenn Dyer Detention Facility), 0862
12 ((U//FOUO) Audio recording on 2/5/2014 from Glenn Dyer Detention Facility between CW and
13 Jaquain Young), 0863 ((U) Audio recording from Glenn Dyer Detention Facility from
14 01/15/2014 with CW, Jaquain Young and unknown); 0864 ((U) 1/14/2014; Audio recording
15 from Glenn Dyer Detention Facility), 0865 ((U) Audio recorded from 01/10/2014–01/12/2014
16 from Glenn Dyer Detention Facility)¹⁰, 0867 (Phone call to Barry Gilton from SFPD Inspector
17 Kevin Jones at 8:52), 0868 ((Phone call to Barry Gilton from SFPD Inspector Kevin Jones at
18 11:33), 0869 (Phone call to Barry Gilton from SFPD Inspector Kevin Jones at 12:38), 0870
19 (Phone Message left by Barry Gilton to SFPD Inspector Kevin Jones at 2:32), 0871 (Phone call
20 to Barry Gilton from SFPD Inspector Kevin Jones at 2:48), 0876 (7 jail calls placed by Lupe
21 Mercado), 0879 (Phone Data – Download of Alfonzo Williams’ Blackberry cell phone), 0882 (3
22 jail calls placed by Lupe Mercado), 0883 (Jail Calls–7 jail calls placed by Alfonso Williams),
23 0885 (Jail Recordings – 5 with Lupe Mercado and remainder with Alfonso Williams), 0886 (16
24 Jail Call Recordings – 12 with Lupe Mercado, 4 with a male), 0894 (Interview of Barry Gilton),
25 0896 (Interview of Lupe Mercado).0904 (Interview of Alfonzo Williams). 0911 (Cellbrite

¹⁰Summary No. 44 of the government's disclosure describes a recorded conversation between Young and an inmate informant on June 18, 2014. Exhibit B at 9. Exhibits 0856, and 0858–0865 describe recorded jail conversations involving Young on other dates, and are therefore not included in the disclosure.

1 Examination Report, Haggarty) 0914 (Cellbrite Exam/report), 0916 (Barry Gilton.doc –
2 Transcript of recorded statement – Barry Gilton), 0917–0929 (Transcripts of Lupe Mercado
3 recorded statements, 6/4/2012, 6/9/012, and 6/16/2012), 0973 (Summaries of calls made by Lupe
4 Mercado), 0976 (Printout of Leticia Gilton’s text messages), 0980 (Emails), 1008 (Jail Calls for
5 415-554-2380 frm 6/18/12–01/02/12), 1049 (Transcript of recorded statement of Lupe Mercado
6 6-9-12), 1053 (Transcript of recorded statement of Barry Gilton), 1082–83 (download of
7 Williams’ phone), 1088 (Note containing telephone numbers possessed by B. Gilton in jail),
8 1090 (report re Barry Gilton’s phone), 1091 (report re Mercado phone), 1096 (Download of
9 Williams’ phone) 1142 (CD containing the SFPD download of Alfonzo Williams’ Blackberry
10 cellular phone).

11 Since the exhibits described above were not included in the government’s letter
12 disclosing co-conspirator statements (Ex. B), such evidence should not be admitted against
13 Gilton at the trial, even if they meet the elements of Rule 801(d)(2)(E). Moreover, the
14 government should only be allowed to introduce these statements at Gilton’s trial if they qualify
15 as admissions against the declarants and the declarants are being tried in the same trial as Gilton.
16 The Court should then instruct the jury on the limited admissibility of the statements.

17 **IN LIMINE MOTION NO. 5: EVIDENCE REGARDING GILTON’S FIREARM
18 POSSESSION ON APRIL 19, 2007 SHOULD BE EXCLUDED BECAUSE THE
19 GOVERNMENT DID NOT PROVIDE TIMELY NOTICE OF ITS INTENT TO
INTRODUCE SUCH EVIDENCE**

20 In its exhibit list, the government identifies fourteen exhibits (Nos. 0235–0248) related to
21 the possession of a firearm by Gilton on April 19, 2007. Dkt. 926 at 9. The government has not
22 previously provided notice of its intent to introduce evidence of this crime. No reference is made
23 to the gun possession incident in the Second Superseding Indictment or in any of the
24 government’s disclosures identifying acts it intends to introduce at trial.

25 The Second Superseding Indictment identifies thirty-five overt acts allegedly committed
26 in furtherance of the RICO conspiracy, charged in Count One. *See* Indictment at ¶ 17. Three
27 overt acts involve crimes allegedly committed by Gilton – possession of a loaded firearm in a
28 vehicle on April 6, 2007 (*id.* at ¶ 17(m)), possession of 9.84 grams of cocaine base on May 1,

1 2008 (*id.* at ¶ 17(o)), and murder of Calvin Sneed on June 4, 2012 (*id.* at ¶ 17(cc)). The
2 indictment makes no reference to Gilton’s possession of a firearm on April 19, 2007 as an overt
3 act in furtherance of the conspiracy.

4 This Court’s initial Order Setting Pre-Trial and Trial Schedule required that the
5 government produce “evidence of other racketeering acts not described in the Second
6 Superseding Indictment” on or before October 21, 2015. Dkt. 353 at 4. On November 10, 2015,
7 Co-Defendant Williams filed a Motion for Racketeering Acts to be Used at Trial, requesting that
8 the government identify what acts referenced in the discovery produced by October 21, 2015 it
9 intended to use. Dkt. 575 at 3. On November 24, 2015, the government provided a letter to the
10 defense stating, “In addition to each of the overt acts listed in the Second Superseding
11 Indictment, the government is aware of the following prior bad acts by the named defendants that
12 may be subject to admission at trial under Rule 404(b).” Ex. C (Letter dated November 24,
13 2015). The letter listed thirteen events by date and SFPD Incident Report Number. The defense
14 was also provided with each incident report. None of the events identified in the government’s
15 letter involved Gilton’s possession of a firearm on April 19, 2007.

16 On December 3, 2015, the government filed an opposition to Williams’ request for a list
17 of racketeering acts. Dkt. 675. In its opposition, the government claimed it had put the defense on
18 notice of the incidents it may seek to introduce as enterprise evidence at trial via the list of overt
19 acts in the Second Superseding Indictment and materials concerning other incidents produced in
20 discovery. The government then listed examples of the discovery materials that discussed other
21 acts evidence. Dkt. 675 at 2. Again, the government made no mention of Gilton’s possession of a
22 firearm on April 19, 2007 as an additional act it intends to prove at trial.

23 On December 30, 2015, in its ruling on Williams’ motion, this Court ordered that the
24 government clarify which other racketeering acts it intends to use at trial. The government was
25 given until January 15, 2016 to “provide a good faith list of additional acts it intends to prove at
26 trial in the form of a limited bill of particulars.” Dkt. 758 at 3.

27 In response to that order, the government filed United States’ Further Statement
28 Regarding Additional Acts the Government Intended to Introduce at Trial. Dkt. 808. In that

1 pleading, the government stated that it intends to introduce evidence of the overt acts listed in the
2 Second Superseding Indictment as well as other acts referenced in “numerous filings and
3 disclosures the government has provided to the defense during the course of this case.” Dkt. 808
4 at 1. The government also listed twenty-one additional other crimes it intends to introduce at the
5 trial. *Id.* at 2–4. Again, the government made no mention of Gilton’s possession of a firearm on
6 April 19, 2007 as an additional act to be proven at trial.

7 Subsequent to the government’s filing of its further statement regarding additional acts,
8 this Court asked that the government specifically identify all of the additional acts it intends to
9 introduce at trial in a single pleading, rather than incorporate by reference other pleadings or refer
10 generally to the discovery. On January 29, 2016, the government filed United States’
11 Consolidated Statement Regarding Additional Acts the Government Intends to Introduce at Trial.
12 Dkt. 851. This pleading specifically described all of the incidents the government intends to
13 prove at trial. Again, the government made no mention of Gilton’s possession of a firearm on
14 April 19, 2007.

15 Since the government has not provided timely notice of its intent to introduce evidence of
16 Gilton’s possession of a firearm on April 19, 2007, all evidence regarding this incident should be
17 excluded.

18 **IN LIMINE MOTION NO. 6: EVIDENCE OF NOTICED “ADDITIONAL ACTS,”
19 INCLUDING GILTON’S POSSESSION OF A FIREARM ON APRIL 6 2007 AND
20 POSSESSION OF DRUGS ON MAY 1, 2008, SHOULD BE EXCLUDED AS
IRRELEVANT, UNDULY PREJUDICIAL AND CUMULATIVE**

21 Gilton moves to limit the amount of evidence of “additional acts” (that is, uncharged acts
22 by him, and acts by other defendants and unindicted alleged co-conspirators) that the government
23 may offer against him at trial. Some of them plainly have no connection to the alleged enterprise,
24 and are therefore irrelevant. Other acts have only a marginal connection, and are far more likely
25 to prejudice the jury against him than they are to prove the existence of a conspiracy or a pattern
26 of racketeering activity. Moreover, the evidence the government intends to present is needlessly
27 cumulative. As few as two acts of racketeering activity can establish a “pattern” for RICO
28 purposes. 18 U.S.C. § 1961(5). But according to its pleadings, the government intends to prove at

1 least seventy-eight discrete acts. *See* Indictment at ¶ 17; Dkt. 851. The Court should impose a
2 reasonable limit of five additional acts, and should require the government to establish the
3 relevance of each act to the alleged conspiracy before presenting evidence of it to the jury.

4 Uncharged acts, including acts committed by others, may be relevant to prove the
5 existence and workings of a racketeering conspiracy. But before offering evidence of such acts,
6 the government must make an “affirmative showing how proof of each incident . . . constitutes
7 proof of the scope of a charged conspiracy.” *United States v. Cervantes*, — F. Supp. 3d —, No.
8 4:12-cr-792, 2016 WL 1029585, *4 (N.D. Cal. 2016) (citing *United States v. Montgomery*, 384
9 F.3d 1050, 1062 (9th Cir. 2004)). Even if the government clears this hurdle for a given
10 “additional act,” the evidence may still be excluded if its probative value is substantially
11 outweighed by the danger of unfair prejudice, confusion of the issues, or the other factors listed
12 in Rule 403 of the Federal Rules of Evidence. In *United States v. Gotti*, 399 F. Supp. 2d 417,
13 418–421 (S.D.N.Y. 2005), for example, the district court found that the tit-for-tat murder of a
14 Mafia hitman was relevant to prove the nature of the Gambino Family enterprise, because it was
15 carried out to defend the enterprise’s reputation and further its goals. The court nevertheless
16 excluded evidence of the murder under Rule 403, reasoning that it would be cumulative with
17 testimony about other murders and violent crimes, and that its “slight” probative value was
18 outweighed by the risk that the jury would infer a propensity to violence. *Id.*

19 Here, the government has not yet made an “affirmative showing” that any of the acts it
20 lists are proof of the scope of the conspiracy, and in many cases, it is impossible to see how it
21 could. Take, for example, the bullet point at the bottom of page 2 in the government’s
22 Consolidated Statement Regarding Additional Acts. Dkt. 851. In that single entry, the
23 government states that it intends to offer evidence of the “various acts committed by unindicted
24 CDP members” contained in 1,987 pages of Gang Task Force police reports
25 (BG087628–89614).¹¹ *Id.* at 2. Those pages contain more than two hundred different incident

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¹¹It does not specify which. As the Court observed when ordering the government to
28 produce a good faith list of additional acts it intended to prove, “It is unclear . . . what crimes
from the . . . wiretap materials or police reports from the gang task force it intends to use.” Dkt.

1 reports. Some of those reports date back to 1995, when Antonio Gilton was nine years old, and
2 are scarcely probative of the scope and workings of the alleged enterprise he is alleged to have
3 joined many years later. *See* Ex. A at ¶ 5. Many of them have no conceivable relevance: for
4 example, the ones that relate to fights between schoolchildren in the late 1990s which did not
5 result in any arrest. *Id.* Likewise, several prior acts the government lists individually—for
6 example, Williams’ solo narcotics possession in 1997 (when Gilton was 11), Ferdinand’s solo
7 narcotics possession in November 2000, and Heard and Elmore’s solo firearms possessions in
8 February 2005 and April 2007 respectively—have so little apparent connection to the conspiracy
9 the government alleges that they must also be excluded on relevance grounds.

10 The government has only listed two prior acts committed by Gilton himself: possession of
11 a firearm in his car’s center console on April 6, 2007 (Indictment at ¶ 17(m)), and possession of
12 9.84 grams of cocaine base on May 1, 2008 (*id.* at ¶ 17(o)). Neither incident is relevant to the
13 alleged conspiracy or probative of Gilton’s participation in it. In both cases, Gilton was by
14 himself when he was arrested; neither of the arrests took place in the Western Addition, where
15 the government claims that CDP principally operates. The gun possession occurred in the
16 Lakeview and the drug possession in the Tenderloin.¹² No evidence links either the firearm or the
17 drugs to the alleged enterprise, any other defendant, or indeed any other person. Many people
18 illegally carry guns or drugs without being involved in an overarching criminal conspiracy. For
19 that reason, solo possession of a firearm or of narcotics, without more, does not tend to prove the
20 existence of a multi-year, multi-member racketeering enterprise—still less membership in a
21 named, charged enterprise.

22 Even supposing these two acts were relevant, whatever probative value they could offer is
23 slight. Indeed, possession of a firearm is not even included in the definition of racketeering
24 activity under 18 U.S.C. § 1961(1). The minimal probative value would be dwarfed by their
25 prejudicial effect. Gilton is charged with a shooting murder, in which it is alleged that the killers
26

27 758 at 3. The government’s Consolidated Statement does not add any clarity.

28 ¹²*See* Ex. D (April 6, 2007 incident report); Ex. E (May 1, 2008 incident report).

1 traveled to and from the scene by car. If the jury hears that Gilton has previously been arrested
2 for possession of a firearm in his car, no instruction could prevent them from thinking that he
3 typically drives around San Francisco armed with a gun, and that the instant charge is simply a
4 “return to form.” This improper inference of propensity would cause severe prejudice. Likewise,
5 a prior arrest possession of crack cocaine may lead the jury to inferences about Gilton’s lifestyle
6 and character that will get in their way of their ability to fairly assess the evidence. Both acts
7 should therefore be excluded.¹³

8 The same goes for the additional acts that do not involve Gilton. Even where the
9 government can make a threshold showing of relevance, Rule 403 counsels exclusion of the
10 evidence. Gilton cannot fairly be expected to meet dozens of discrete accusations that were never
11 the subject of a conviction, and with which he was not personally involved. The longer ago the
12 alleged incidents, the harder it is to meaningfully contest the government’s evidence, and the
13 greater the corresponding prejudice. This is so despite the fact that Gilton is charged with
14 murder. *See Gotti*, 399 F. Supp. 2d at 420. Moreover, the government’s presentation is needlessly
15 cumulative. Among more than seventy-eight additional acts disclosed by the government, there
16 are five homicides (not including the charged Calvin Sneed homicide), twelve instances of gun
17 possession, and nineteen robberies. The legitimate purposes for which “additional acts” evidence
18 is admissible—proving the existence of an enterprise, a conspiracy, or of a pattern of
19 racketeering—can be achieved with a small selection of the acts the government lists. Once it has
20 put on evidence of three or four serious crimes committed by alleged CDP members, putting on
21 evidence of fifty more, including an armed robbery spree by other defendants against members of
22 the public, serves little purpose other than inflaming the jury against anyone even tangentially
23 associated with the perpetrators. A needlessly cumulative presentation on one element of the
24 conspiracy and VICAR charges will not only waste time, but also risks impairing the jury’s
25 ability to judge whether the government has met its burden on the other elements.

26 _____
27 ¹³Nor are the incidents admissible under Rule 404(b) of the Federal Rules of Evidence.
28 Arrests for possession of a gun and cocaine, more than four years before the charged homicide,
do not tend to prove the killer’s identity, Gilton’s intent, or any other relevant fact.

1 Gilton proposes a limit of five additional acts in order to strike “the appropriate Rule 403
2 balance” in this case. *See United States v. Reyes*, No. 2:11-cr-77, 2014 WL 4722505, *18 (N.D.
3 Ind. Sep. 23, 2014) (“appropriate . . . balance” struck where government introduced evidence of
4 three uncharged murders and did not pursue ten others.) The acts should be chosen to achieve the
5 government’s legitimate evidentiary objectives without causing undue prejudice to Gilton. The
6 Court should order the government to make an election of the five additional acts in advance of
7 trial so that Gilton can adequately prepare his defense. Moreover, it should not permit the
8 government to introduce evidence of any additional act until it has made the threshold showing
9 of relevance described in *Cervantes. Supra*, at *4.

10 **IN LIMINE MOTION NO. 7: THE GOVERNMENT SHOULD BE PROHIBITED FROM
11 USING PRIOR CONVICTIONS TO IMPEACH GILTON, SHOULD HE TESTIFY**

12 Gilton moves to bar the government from impeaching him, should he testify, with his
13 2007 felony conviction for unlawful possession of a concealed firearm or his 2008 felony
14 conviction for possession of cocaine base for sale.

15 The admissibility of felony convictions for the impeachment of a defendant on the stand
16 is governed by Rule 609(a)(1)(B) of the Federal Rules of Evidence.¹⁴ It puts the burden on the
17 prosecution to establish that the conviction’s probative value in attacking the defendant’s
18 truthfulness outweighs the prejudice it will cause him. *United States v. Bagley*, 772 F.2d 482,
19 487 (9th Cir. 1985). The source of the prejudice is simple: when exposed to prior convictions, the
20 jury may see the defendant as “a ‘bad’ person” who is predisposed to commit crimes. *See Gordon*
21 *v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.). Moreover, where the prior
22 conviction is sufficiently similar to the charged crime, exculpatory evidence may be

23 _____
24 ¹⁴A more permissive rule applies to crimes involving “a dishonest act or false statement.”
25 *See Fed. R. Evid. 609(a)(2)*. But that does not embrace all crimes involving a lack of probity or
26 integrity—it is narrowly interpreted to cover “crimes that factually or by definition entail some
27 element of misrepresentation or deceit.” *United States v. Brackeen*, 969 F.2d 827, 831 (9th Cir.
28 1992) (en banc) (per curiam). Bank robbery, for example, is not a crime of dishonesty. *Id.* Nor is
smuggling hashish into the United States: it is merely a “surreptitious activity,” not necessarily
involving misrepresentation. *United States v. Mehrmanesh*, 689 F.2d 822, 833–34 (9th Cir.
1982); *accord United States v. Gross*, 603 F.2d 757, 758–59 (9th Cir. 1979) (“narcotics offenses”
not crimes of dishonesty).

1 “overwhelmed by a jury’s fixation on the human tendency to draw a conclusion which is
2 impermissible in law: because he did it before, he must have done it again.” *Id.* at 488. Unless the
3 prosecution shows that the conviction’s legitimate probative value outweighs the risk that the
4 jury will draw these damaging inferences of propensity, the Court must exclude the conviction.

5 The Court considers five factors in judging whether the prosecution has met this burden:
6 (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the
7 witness’ subsequent history; (3) the similarity between the past crime and the charged crime; (4)
8 the importance of the defendant’s testimony; and (5) the centrality of the credibility issue. *United*
9 *States v. Jimenez*, 214 F.3d 1095, 1098 (9th Cir. 2000) (citing *United States v. Cook*, 608 F.2d
10 1175, 1185 n. 8 (9th Cir. 1979) (en banc)). The fourth factor refers to the risk that the defendant’s
11 right to testify in his own defense might be chilled by the threat of impeachment: as then-Judge
12 Burger explained, “[e]ven though a judge might find that the prior convictions are relevant to
13 credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may
14 nevertheless conclude that it is more important that the jury have the benefit of the defendant’s
15 version of the case than to have the defendant remain silent out of fear of impeachment.”
16 *Gordon*, 383 F.2d at 940.

17 In this case, all five factors cut in favor of exclusion. Neither possession of cocaine base
18 for sale nor possession of a concealed firearm are crimes of dishonesty, and neither have much
19 rational bearing on a person’s truthfulness. See *United States v. Puco*, 453 F.2d 539, 542 (2d Cir.
20 1971) (error to allow impeachment with conviction for importation of narcotics, in violation of
21 former 21 U.S.C. § 174, since it “negates credibility only slightly” and is not “particularly
22 relevant to in-court veracity”). Both convictions are eight years old, just short of the presumptive
23 ten-year limit that Rule 609 imposes, and Gilton has not suffered any felony convictions since.
24 The convictions are both prejudicially similar to the charged conduct, since the conspiracy
25 described in the Indictment involves both guns and drugs.¹⁵ Gilton’s testimony will shed light on
26

27 ¹⁵For the reasons set out in Gilton’s In Limine Motion No. 6, the Court should not allow
28 evidence of his prior acts to be used as substantive evidence of the conspiracy. But even if it does
allow such evidence, the convictions should still be excluded. Only the prior act, not the

1 his connection to the co-defendants and his defense to the charged homicide in a way that no
2 other evidence likely could. Finally, although credibility is always important, it is by no means
3 the central issue: in light of all the evidence the government plans to put on, the case is unlikely
4 to “hinge[] on a credibility choice” in which the jury must “decide whether to believe the
5 [defendant] or the police officers.” *Cf. United States v. Brito*, 427 F.3d 53, 64 (1st Cir. 2005).

6 The Court should bar impeachment using either conviction, or using any conviction the
7 government has not disclosed. In the alternative, in order to minimize the inevitable prejudice,
8 the Court should permit the government to ask only whether Gilton has ever been convicted of a
9 felony, and bar impeachment using multiple felony convictions or the nature of the convictions.

10 **IN LIMINE MOTION NO. 8: THE GOVERNMENT SHOULD NOT BE ALLOWED TO
11 USE GUILTY PLEAS OR CONVICTIONS OF ITS WITNESSES AS SUBSTANTIVE
PROOF OF GILTON’S GUILT OF THE RICO CONSPIRACY**

12 It is expected that the government will call witnesses who have previously pled guilty to
13 crimes. These witnesses may have pled guilty to the same conspiracy charge that is alleged in
14 Count One against Gilton. In this motion, Gilton seeks an order from the Court precluding the
15 government from using such guilty pleas or convictions as substantive proof of Gilton’s guilt.

16 The law on this point is well settled. The guilty plea or conviction of a witness “may not
17 be offered by the government and received over objection as substantive evidence of the guilt of
18 those on trial.” *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981). Such evidence is
19 only admissible to allow the jury to assess the credibility of the witness. *Id.*; see also *United*
20 *States v. Smith*, 790 F.2d 789, 793–94 (9th Cir. 1986).

21 Consistent with this authority, if the government in this case seeks to introduce evidence
22 of a witness’ guilty plea or conviction that evidence must be limited in purpose. The jury must be
23 instructed accordingly.

24 ///

25 conviction, is relevant to prove a conspiracy. *Cf. United States v. Taylor*, 210 F.3d 311, 316-17
26 (5th Cir. 2000) (convictions of unindicted co-conspirator not admissible as intrinsic evidence in
27 support of conspiracy charge, since “[c]riminal judgments are not acts in furtherance of a
28 conspiracy”). Allowing the government to impeach Gilton with the convictions as well as prove
his guilt with the underlying acts would compound the prejudice to him, and make an improper
inference of propensity all but unavoidable.

1 **IN LIMINE MOTION NO. 9: MUG SHOTS SHOULD BE EXCLUDED**

2 Government Exhibit 1086 is described on the exhibit list as “Mugshots for Williams, A
3 Gilton, B Gilton and Mercado.” Gilton moves to exclude his mug shot as well as mug shots of
4 co-defendants from being admitted into evidence pursuant to FRE 401 and 403.

5 In *United States v. Jaeger*, 298 F.2d 1003, 1009 (D. Haw. 2003), the district court
6 explained that courts “have generally held that it is error to admit an obvious mug shot from a
7 prior arrest.” The rationale for this rule was discussed in *United States v. George*, 160 Fed.Appx.
8 450, 456 (6th Cir. 2005) (unpublished). According to the Sixth Circuit,

9 Trial courts generally exclude mug shots from evidence. Mug shots, like evidence
10 of prior convictions, are usually not admissible under Fed.R.Evid. 404(b)
11 (evidence of other crimes, wrongs, or acts). Even if relevant, a mug shot tends to
12 make people believe that the person is “bad,” and therefore can be unfairly
13 prejudicial. Fed.R.Evid. 403. Moreover, the visual impact of a mug shot, apart
14 from mere references to a prior conviction, can leave a lasting, although
15 illegitimate, impact on the jury. [Citation.] Accordingly, the use of mug shots at
16 trial is highly disfavored.

17 *Id.*; see also *United States v. Castaldi*, 547 F.3d 699, 704 (7th Cir. 2008) (“Mug shots are
18 generally not admissible at trial because they are indicative of past criminal conduct and thus
19 barred by concerns about presenting evidence of a defendant's past criminal conduct to a jury”).

20 Mug shots from prior arrests have been found admissible in very limited circumstances.
21 Numerous Circuits have identified three prerequisites to the admission of a defendant's mug shot
22 from a prior arrest: (1) the government must have a demonstrable need to introduce the
23 photographs; (2) the photographs themselves, if shown to the jury, must not imply that the
24 defendant has a prior criminal record; and (3) the manner of introduction at trial must be such
25 that it does not draw particular attention to the source or implications of the photographs. *United*
26 *States v. Harrington*, 490 F.2d 487, 494 (2d Cir. 1973); accord *United States v. Carrillo-*
27 *Figueroa*, 34 F.3d 33, 40 (1st Cir. 1994) (citation omitted); *United States v. Torres-Flores*, 827
28 F.2d 1031, 1037 (5th Cir. 1987) (citation omitted); *United States v. Castaldi*, 547 F.3d 699, 704
29 (7th Cir. 2008) (citation omitted); *United States v. Hines*, 955 F.2d 1449, 1455–56 (11th Cir.
30 1992) (citation omitted).

31 Here, since the government has not met the narrow criteria for admitting mug shots from

1 prior arrests, the general rule calling for exclusion should be followed.

2 **IN LIMINE MOTION NO. 10: EXCLUSION OF GRUESOME, UNDULY PREJUDICIAL**
PHOTOGRAPHS OF HOMICIDE VICTIMS

3

4 The government's exhibit list includes crime scene, autopsy and medical examiner
5 photographs from six different homicides, but does not specify which photographs it actually
6 intends to use. See Dkt. 926, Exhibits 0095–96 (Donte Levexier homicide), 0470–73 and
7 0476–81 (Helton and Turner homicides), 0571–72 (Richard Barrett homicide), 0785–86 (Jelvon
8 Helton homicide), and 0988–89 (Calvin Sneed homicide). Each exhibit represents an array of
9 photographs.

10 In *Rivers v. United States*, 270 F.2d 435, 437–38 (9th Cir. 1959), the Ninth Circuit
11 explained the rule regarding the admissibility of photographs that depict homicide victims:

12 Such photographs should be excluded where their principal effect would be to
13 inflame the jurors against the defendant because of the horror of the crime; on the
14 other hand, if they have a probative value with respect to a fact in issue that
15 outweighs the danger of prejudice to the defendant, they are admissible, and the
16 resolution of this question is primarily for the trial court in the exercise of its
discretion.

17 *Id.* (quoting *People v. Chavez*, 50 Cal. 2d 778 (1958)).

18 At present, hundreds of photographs of homicide scenes and victims, many of them quite
19 gruesome, are designated as trial exhibits. Pursuant to *Rivers*, Gilton moves for an order that
20 government provide a selection of photographs it intends to use to the Court and the defense, so
21 that they can be reduced to a less prejudicial and overwhelming quantity. The court should then
22 exclude those photographs that either unduly prejudicial, because of their gruesomeness, or
23 cumulative, pursuant to Rules 401 and 403 of the Federal Rules of Evidence.

24 **IN LIMINE MOTION NO. 11: WITNESSES SHOULD BE EXCLUDED FROM THE**
COURTROOM WHEN NOT TESTIFYING

25 Rule 615 of the Federal Rules of Evidence states that: “at the request of a party the court
26 shall order witnesses excluded so that they cannot hear the testimony of other witnesses . . .”
27 Gilton hereby requests that the Court issue such an order pursuant to Rule 615.

28 ///

**IN LIMINE MOTION NO. 12: GOVERNMENT SHOULD BE ORDERED TO PROVIDE
ADVANCE NOTICE OF WITNESSES TO BE CALLED AND INCIDENTS TO BE
COVERED DURING A TRIAL WEEK**

It is anticipated that the trial of this case will be very lengthy and that the government will call many witnesses to testify about a myriad of different incidents. The government's initial witness list has 341 names on it. Its exhibit list identifies 1,255 exhibits, and the Second Superseding Indictment refers to thirty-five RICO acts. In total, the government has identified more than seventy-eight additional acts about which it intends to introduce evidence at the trial.

In order to allow for effective preparation by defense counsel and to avoid mid-trial continuances, the government should be ordered to provide the defense with weekly witness lists, identifying the witnesses to be called each day of the following week and the incidents that will be covered by the testimony. Similar procedures have been used in other lengthy trials and fall within “the court’s inherent authority to manage its docket.” *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (court has power to order filing of “finalized” government witness list and bar undisclosed government witnesses).

IN LIMINE MOTION NO. 13: JOINDER

Gilton moves to join in the in limine motions filed by co-defendants that are applicable to him.

DATED: April 6, 2016

Respectfully submitted,

/s/ Mark Goldrosen
MARK GOLDROSEN
Attorney for Antonio Gilton